United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

74-2147

To be argued by
PETER L. BERGER

B
P/S

In The

United States Court of Appeals

For The Second Circuit

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiffs-Appellants,

- against -

NEW YORK STOCK EXCHANGE, INC., KIDDER, PEABODY & CO., INC., MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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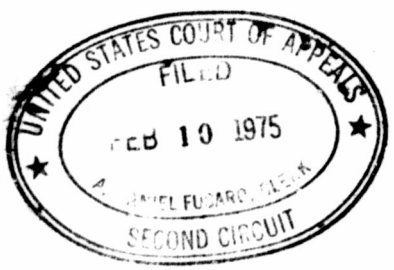

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPEAL NO. 74-2147

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiff-Appellants

v.

NEW YORK STOCK EXCHANGE, INC., KIDDER, PEABODY & CO., INC., MERRILL, LYNCH PIERCE, FENNER & SMITH, INC.,

Defendant-Appellees

On Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF FOR APPELLANT

ARGUMENT

The three briefs from the defendants present three defenses.

1. The New York Stock Exchange asserts that the only evidence against the Exchange is "that the other defendants are members of it." (Brief p. 2)

However, Merrill Lynch, a member broker directly involves the Exchange. In its letter to plaintiffs, Appendix p. 169, it said:

> "... this procedure is carried out within all the New York Stock Exchange regulations and under their general supervision."

Here is direct evidence that the conduct of the brokers has been planned by that collective will of all brokers known as the New York Stock Exchange. By naming the New York Stock Exchange, plaintiffs are attempting to reach all members of the Exchange who engage in similar activities. When plaintiffs wrote the Exchange to protest the member's conduct, Appendix p. 62, no correction ensued.

2. Kidder, Peabody has responded in effect: You started to arbitrate your claim against us and you are stuck with the New York Stock Exchange which you elected as a forum. Your objection to the presence of two members of the Exchange as arbitrators does not warrant your change of forums to the District Court.

However, the plaintiffs did not elect to prosecute their claim for return of the interest charges before the Exchange. Instead they selected a judicial forum, the New York State Court, Appendix p. 56-57. This they had a right to do under 15 U.S.C. 77(1)(2) and 77(n)(14) (Appendix Preface p. i). The statute plainly holds that any agreement to compel arbitration is "void" -- not merely unenforceable. The United States Supreme Court has upheld the statute in the Wilko decision.

While plaintiffs were seeking to recover the interest in the State Court, Kidder wrote plaintiffs a letter, Appendix p. 133, to select the forum for arbitration, ignoring plaintiffs' choice of the State Court. This was followed promptly with Kidder's written election of the New York Stock Exchange under the arbitration agreement:

> "If the undersigned does not make such election by registered mail addressed to you at your main office in New York City within five days after demand by you that such election be made, then you Kidder may make such election." Appendix p. 27.

Thus contrary to the assertion in the Kidder brief, the election to use the New York Stock Exchange was made by Kidder.

It was highly prejudicial against the plaintiffs, for the District Court to allow the defendant Kidder to obtain a one-sided arbitration award, after the

Federal proceedings were started. The same issues would still have to be resolved by the District Court in the Merrill Lynch action, and a contrary judgment could hardly have been expected.

Thus, the District Court effectively substituted the Exchange arbitration judgment for its own in this proceeding, over the plaintiff's protest.

3. Merrill Lynch in effect argues: We are not liable for our conduct inasmuch as we returned the interest charges. Actually only $1,254.33 was returned of a total of $1,322.04 (Appendix p. 179). The difference is not an arithmetical error. It represents the interest on $6,000. cash which the broker forced plaintiffs to loan to Merrill Lynch to stave off more interest charges. But what about the retention by the brokers of the $341,000. received by them for the sale of 8900 shares of plaintiffs, about which the District Court said, Appendix p. 146,:

> "As the proceeds of sale remained with Kidder, plaintiffs lost the use of their money for a period, and Kidder used the funds for its own business, including the making of interest-bearing loans to other customers."

In the case of Merrill Lynch, the plaintiffs' funds were improperly withheld for one and one-half years, defendants brief p. 6. If the entire $341,000. had been withheld for this period, at 10%, the approximate interest rate, the total amount involved would have been about

$50,000. The real loss of interest is less but equally impressive.

The plaintiff, H.E. Rubens is charged with being a lawyer in two of the defendant briefs. This plaintiff is a retired patent lawyer who engaged in the aforesaid activity to protect his life savings. For his efforts, the Merrill Lynch brief charges him with duplicity, and that "such duplicity should not be tolerated", page 7, thereof. The merit of this charge we leave to this forum.

The defendants' briefs do not go into the heart of the issues. Was the sale from the "box" a sale of plaintiffs' interest in the 8900 shares deposited with the brokers, or a sale of shares belonging to other brokers as some defendants allege?

The plaintiffs have shown by transfer agent records, that among the shares sold for plaintiffs, were actual registered shares in plaintiffs names. The defendants have not explained how these shares can be considered "borrowed" which would justify the retention of $341,000. for the private gain of the brokers, as the District Court found. And if "borrowed," with the corresponding 8900 shares of plaintiffs in the possession of the brokers, would there be any justification for anything more than a nominal charge instead of interest receipts reaching into five figures?

It is the position of the plaintiffs, that the sale of 8900 shares deposited with the defendant brokers constituted an equitable sale of plaintiffs' interest in the 8900 shares. Plaintiffs actually liquidated their shares. Because the brokers treat the deposited shares as fungible, the Internal Revenue Service gives the owner of the shares the option of repurchasing the shares (a step which the brokers call "covering", improperly so in a "box" sale) but at a 100% increase in tax liability to the share owner. Plaintiffs presume the increase in tax liability gives the Internal Revenue Service justification for what is apparently an outright sale.

While plaintiffs can see some merit for a nominal charge by a broker for the extra bookkeeping involved in a "box" sale, there is absolutely no basis for the so-called "mark-to-the-market" which resulted in the charge of interest, which in some cases, could reach astronomical proportions. The brokers are as much without risk in a "box" sale as they are in a direct sale. They insist on retaining possession of both the shares to be sold, as well as the selling price, and in addition charge interest at the prevailing rates, which in our times is intolerable.

Only in the final accounting of the transactions were plaintiffs certain that the brokers fully intended to deduct the interest charges from the monies finally paid to

the plaintiffs. When Kidder, Peabody insisted on increasing the cost of buying and selling shares, which the Exchange brief itself states is improper, plaintiffs decided that the practice should be stopped. Thereafter, when plaintiffs learned that they were barred from a review by the judicial system, and were forced to deal with the Exchange itself over the conduct of its member brokers, did plaintiffs seek the Federal forum.

CONCLUSION

The orders of the District Court should be reversed and the plaintiffs' motion for summary judgment should be granted.

Respectfully submitted,

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U.S. COURT OF APPEALS:2nd CIRCUIT

Index No.

HARRY ERNEST RUBENS and JEANNE RUBENS,

Plaintiffs-Appellants,

- *against* -

Affidavit of Personal Service

NEW YORK STOCK EXCHANGE, INC., et al,

Defendants-Appellants.

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York

That on the 10th *day of* feb. *19* 75 *at* *

deponent served the annexed Reply Brief *upon*

**

the *in this action by delivering* 8 *true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) . *herein,*

Sworn to before me, this 10th *day of* February *19* 75

James Steele

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC STATE OF NEW YORK
QUALIFIED IN [illegible] COUNTY
COMMISSION EXPIRES MARCH 30, 1975

* **

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